

a

LENG HONG YUEN

v.

ESCALATION ENTERPRISE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

b

[SUIT NO. 23-3034-86]

21 APRIL 1989

CONTRACT: *Written undertaking - Given by defendant as secretaries to principal debtor - Master and servant relationship - Payment can only be made on instruction.*

c

This is an appeal by the plaintiff against the Senior Assistant Registrar's decision in allowing the 6th defendant's application to strike out the plaintiff's writ and amended statement of claim and under O. 18 r. 19(1)(a) on the ground that it discloses no cause of action.

d

6th defendant are secretaries and authorised co-signatories of the bank account for the 1st defendant. The 1st defendant obtained a loan of RM9.5 million from Central Co-operative Bank whereby bank agreed to release RM5.5 million as a first disbursement. The 1st defendant then authorised the 6th defendant to make certain payments from out of the RM5.5 million to 2 creditors, one being the plaintiff.

e

The debts due to the plaintiff arose from 2 transactions: (1) sums of RM130,000 being the consultation fees due from services rendered by the plaintiff in securing the entire equity of 2 companies on behalf of the 1st defendant. (2) Sums of RM170,000 pursuant to an agreement dated 25 February 1986, between the plaintiff and 1st defendant. In addition to the agreement, there was a written undertaking by the 6th defendant to pay the plaintiff both the sums stated above.

f

Upon release of the RM5.5 million by the bank to the 1st defendant, the 1st to 5th defendants refused to honour their obligations. Plaintiff turned to the 6th defendant for payment based on the written undertaking. However the 6th defendant disputed liability on the ground that the undertaking was given to their principals i.e., the 1st defendant and not the plaintiff.

Held:*g*

[1] From the peculiar facts of this case, the 6th defendant are not debtors of the plaintiff, for as the secretaries of the 1st defendant, they are only agents of the 1st defendant, who are the principal debtors of the plaintiff.

[2] The payments to be made pursuant to the written undertaking are to come from the 1st defendant's account. As secretaries for the 1st defendant, 6th defendant only acts on the instruction of the 1st defendant, there is a servant and master relationship and between them. Therefore they can only make payment on the instruction of the 1st defendant.

[Appeal dismissed with costs.]

*h***Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the plaintiff/appellant - Dennis Xavier; M/s. Xavier & Chandran

For the 6th defendant/respondent - Harcharan Singh; M/s. Azman Davidson & Co.

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JUDGMENT

Siti Norma Yaakob J:

On 19 January 1989, the Senior Assistant Registrar allowed the application of the 6th defendant to have the plaintiff's writ and amended statement of claim against them struck out with costs under O. 18 r. 19(1)(a) and under the inherent jurisdiction of the Court on the ground that the amended statement of claim discloses no cause of action against them. The present proceedings before me is an appeal by the plaintiff against the Senior Assistant Registrar's order.

It is not disputed that the 6th defendant are secretaries of the 1st defendant and the authorised co-signatories of the bank account of the 1st defendant.

In November 1985, the 1st defendant obtained a loan of RM9.5 million from the Central Co-operative Bank (CCB) and CCB agreed with the 1st defendant to release RM5.5 million from the loan as a first disbursement. The 1st defendant then authorised the 6th defendant, as their secretaries, to make certain payments from out of RM5.5 million to 2 persons to whom the 1st defendant were indebted, one being the plaintiff.

The debts due to the plaintiff from the 1st defendant arose from two transactions. The first is for RM130,000, being the consultation fees due for services rendered by the plaintiff in securing the entire equity of 2 companies on behalf of the 1st defendant. Payment for this debt also included any liability for income-tax due on the consultation fees, which the 1st defendant had also agreed to pay. The liability for this debt has been sanctioned by a resolution dated 10 January 1986 passed by the board of directors of the 1st defendant.

The 2nd transaction concerns a short term loan of RM170,000 which had been granted by Kwong Yik Finance Berhad to the 1st defendant. In addition to the joint and several guarantee provided by the 2nd - 5th defendants, as the directors of the 1st defendant, the plaintiff had also created a first legal charge of his land to the finance company. However, as the plaintiff had already charged the land to Koperasi Mewah Berhad, the land had to be redeemed first before the plaintiff can create a first legal charge in favour of Kwong Yik Finance. The redemption sum of RM68,000 was settled from out of RM170,000 loan approved by Kwong Yik Finance and in consideration of the plaintiff repaying the redemption sum of RM68,000 to the 1st defendant, an agreement dated 25 February 1986 was entered into between the plaintiff and the 1st defendant, wherein the 1st defendant undertook to repay the RM170,000 to Kwong Yik Finance in the following manner:

- (1) Upon the release by CCB of the first disbursement of RM5.5 million, the 1st defendant was to repay the plaintiff the RM170,000 and all interests due and owing to Kwong Yik Finance to date of payment.
- (2) Notwithstanding any period of repayment set out in the loan agreement between the 1st defendant and Kwong Yik Finance, the 1st defendant was to authorise the 6th defendant to give a letter of undertaking that immediately upon receipt of the disbursement of RM5.5 million, the 6th defendant would pay out from the account of the 1st defendant the RM170,000 plus any accrued interest to the plaintiff.

Pursuant to the above arrangement, the 6th defendant executed the written undertaking on 16 January 1986 to pay the plaintiff both the consultation fees of RM130,000 and the RM170,000.

a CCB released the RM5.5 million to the 1st defendant on 6 June 1986 and when the 1st - 5th defendant refused to honour their obligations to make the 2 payments to the plaintiff, as the principal borrowers and guarantors, the plaintiff turned to the 6th defendant for payment based on the written undertaking dated 10 January 1986. The 6th defendant dispute liability on the ground that the undertaking was given to their principals, the 1st defendant, and not to the plaintiff.

b As the 6th defendant are the secretaries of the 1st defendant, and they act on the instructions of the 1st defendant, there is a servant and master relationship between them. The 6th defendant manage the bank account maintained by the 1st defendant and being the authorised co-signatories, they can only make payments on the instructions of the 1st defendant.

c The 6th defendant were not made parties to any of the 2 transactions that resulted in the sum of RM130,000 and RM170,000 becoming due and payable to the plaintiff. As such, there is no contractual relationship between the plaintiff and the 6th defendant. The RM130,000 represented the plaintiff's consultation fees for having successfully secured the purchase of the entire equity of 2 companies on behalf of the 1st defendant. The fact that the RM130,000 is a personal debt of the 1st defendant is borne out by the resolution passed by the board of directors of the 1st defendant on 10 January 1986, which clearly states that the 1st defendant shall pay the plaintiff that amount. This is again made clear by the 1st defendant in their letter dated 10 January 1986 addressed to the plaintiff, where at the 2nd paragraph, the 1st defendant had this to say:

e We will authorise our secretaries SECCO Sdn. Bhd. to pay the abovementioned consultation fee directly to you from our company's bank account immediately upon receipt by us the first or initial disbursement of the approved loan by Co-operative Central Bank Bhd. We will cause our secretaries abovementioned to give you an undertaking to comply with the aforesaid.

The RM170,000 short term loan was granted by Kwong Yik Finance Bhd. to the 1st defendant but for its repayment, the 1st defendant had instructed their servants and agents, the 6th defendant, to make repayment to the plaintiff on the 1st defendant's letter of instructions to the 6th defendant, also dated 10 January 1986.

f It is against this background that the 6th defendant's undertaking must be read and understood. This is so as the undertaking is addressed to the 1st defendant and copied to the plaintiff. The payments to be made pursuant to the undertaking are to come from the 1st defendant's account and not from the 6th defendant.

g From the peculiar facts of this case, the 6th defendant are not debtors of the plaintiff, for as the secretaries of the 1st defendant, they are only agents of the 1st defendant, who are the principal debtors of the plaintiff. As no cause of action can be founded on the undertaking given by the 6th defendant, the Senior Assistant Registrar was right in striking out the writ and amended statement of claim against the 6th defendant under O. 18 r. 19(1)(a) and under the inherent jurisdiction of the Court and to that extent, I had dismissed the plaintiff's appeal with costs.

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Also found at [1990] 1 CLJ 300

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